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Sherbert v. Verner,
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Other Authorities:

Alabama Recreation and Park News,
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Gunther, The Supreme Court 1971 Term,
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Harvard Law Review, Vol. 73,
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Iowa Law Review, Vol. 58, p. 108 (1973) 24, 37

Mississippi Law Journal, Vol. 44,
p. 1017 (1973) 35

Schaeffer, Private Clubs: Freedom of Association Overlooked in Effort to Guarantee Equal Protection,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1517

GEORGIA THERESA GILMORE, GUSSIE CARLTON, SYLVIA JOHNSON, J. C. SMITH, MATTIE CARGILL, FRED HARRIS, GEORGE STEPHENS, ELIZABETH BROWN, on behalf of themselves and all others similarly situated,

PETITIONERS,

—v.—

CITY OF MONTGOMERY, ALABAMA, a Municipal Corporation; BOARD OF COMMISSIONERS OF THE CITY OF MONTGOMERY; JIM ROBINSON, CLIFF EVANS and J. B. RUCKER, as Members of the Board of Commissioners of the City of Montgomery; RECREATION BOARD OF THE CITY OF MONTGOMERY; RUFUS A. LEWIS, JEAN B. CAMPBELL, JAMES HALL, MUREAL R. CRUMP, CHARLES STAKELY, CHARLES W. ROSS and JAMES E. VICE, JR., as Members of the Recreation Board of the City of Montgomery; HENRY M. ANDREWS, as Superintendent of the Parks and Recreational Program for the City of Montgomery, Alabama,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. WHETHER PRIVATE ORGANIZATIONS INCLUDING CHURCH, CIVIC, FRATERNAL AND CHARITABLE GROUPS MAY USE AND ENJOY PUBLIC RECREATIONAL FACILITIES WITHOUT REGARD TO THE RACIAL ADMISSIONS POLICIES OF SUCH PRIVATE ORGANIZATIONS?

2. WHETHER THE CONSTITUTION PROHIBITS THE USE AND ENJOYMENT OF PUBLIC RECREATIONAL FACILITIES, IN COMMON WITH OTHER MEMBERS OF THE PUBLIC, BY INDIVIDUAL CHILDREN OR GROUPS OF STUDENTS WHO MAY BE ENROLLED IN SEGREGATED PRIVATE SCHOOLS?

STATEMENT OF THE CASE

The original decision in this class action litigation was entered by the United States District Court for the Middle District of Alabama on September 9, 1959.[1] The plaintiffs, on behalf of themselves and other similarly situated Negroes in Montgomery, Alabama,

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1. Gilmore, et al. v. City of Montgomery, 176 F. Supp. 776 (M. D. Ala. 1959).

had prayed that the defendant City officials, including the members of the Parks and Recreation Board of the City of Montgomery be "permanently enjoined from making any distinction on account of race or color in extending and granting the right and privilege of admission to and use of Oak Park or any other public park. . ."[2] The trial court granted the relief requested by the plaintiffs and the Court of Appeals for the Fifth Circuit affirmed with the modification that the District Court should "retain jurisdiction of this case for such reasonably long period as may appear to be advisable." (277 F. 2d 364, 368) Thereafter the City has operated all public recreational facilities and parks on a non-discriminatory and desegregated basis.[3]

In a "Motion for Supplemental Relief" filed on September 8, 1971 the petitioners asked the District Court to:

> "Issue a permanent injunction against defendants, their officers, agents, servants, and employees, restraining them from allowing or in any way sanctioning the use of City owned and operated recreational facilities by any private school, group, club or organization which is racially segregated or which has a racially discriminatory admissions policy."

The petitioners in support of their prayer in the Motion for Supplemental Relief alleged that the City

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2. See excerpt as set forth in Circuit Court Opinion, City of Montgomery v. Gilmore, 277 F. 2d 364 at p. 366.

3. Effective January 1, 1959 which was prior to the original Order of September 9, 1959 and for some time thereafter the City operated no parks. When the facilities were reopened they were and have continued to be operated on a completely desegregated and non-discriminatory basis.

had a "practice and policy of permitting any private school or club, even if the school or club is racially segregated to use available City recreational facilities and that Negro individuals were unknowingly forced to subsidize racially segregated schools and organizations. (App. 15; App. 19)

In answer to the 1971 petition, the City set forth that all municipal recreational facilities throughout the City of Montgomery were, in fact, open to all on an equal basis with people of the community all having equal access thereto, without regard to race or color. (App. 55; App. 58) The answer of the City specifically denies any discrimination between racial groups with regard to the availability of recreational facilities. (App. 57) These respondents deny that they engage in any practice which fails to give Negroes protection equal to that afforded to whites. (App. 57)

The "Motion for Supplemental Relief" was submitted to the District Court upon the pleadings, stipulations and briefs.[4] (App. 18a) The District Court on January 18, 1972 issued an order which is essentially in two parts. Paragraphs 1 and 2 deal with private schools and school affiliated groups while Paragraphs 3 and 4 deal with non-school private clubs, groups and organizations. These portions of the District Court Order are as follows:

"1. That the City of Montgomery, Alabama's policy and practice of permitting the use of city owned or operated recreational facilities by any private school, or private school affiliated group, which

4. *Gilmore v. City of Montgomery*, (M. D. Ala. 1972) 337 F. Supp. 22, 24.

school or group is racially segregated or which has a racially discriminatory admissions policy be and the same is hereby declared unconstitutional.

2. That said City of Montgomery, Alabama, its officers, agents, servants, employees, and those acting in concert with it, be and each is hereby enjoined from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private school, or private school affiliated group, if such school or group is racially segregated or if it has a racially discriminatory admissions policy.

3. That said City of Montgomery, Alabama's policy and practice of permitting the use of city owned or operated recreational facilities by any private group, club or organization which has a racially discriminatory admissions policy be and the same is hereby declared unconstitutional.

4. That said City of Montgomery, Alabama, its officers, agents, servants, employees and those acting in concert with it, be and each is hereby enjoined from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private group, club or organization which is not affiliated with a private school and which has a racially discriminatory admissions policy." (337 F. Supp. 22, 26; App. 25a and 26a)

It is noted that the District Court in the relief granted made a distinction between private schools as compared with private groups "other than those affiliated with schools." In this regard the District Court held:

"Whereas state and city officials are under an affirmative obligation to end discrimination in situations involving education, this affirmative duty does not extend to cases involving private groups other than those affiliated with schools." (App. 24a-25a; 337 F. Supp. 22, 25)

The City appealed to the Circuit Court of Appeals for the Fifth Circuit from the aforementioned order of the District Court. (App. 69) Pending appeal the District Court by agreement of the parties stayed Paragraphs 3 and 4 of the above order which deal with private groups, clubs and organizations which are not affiliated with a private school. (App. 74-75)

The Court of Appeals affirmed with modification the first portion of the District Court order dealing with private schools and school affiliated groups (Paragraphs 1 and 2).

The modification by the Court of Appeals was to "make clear" that the District Court order should not be read to prohibit the "communal use" of such public recreational facilities as zoos, museums and parks, by private school students in common with other members of the public or to prohibit such students from attending along with other citizens, civic and cultural events conducted in City recreational facilities. (App. 16a; App. 10a; 473 F. 2d at pp. 839-840, and 837) The Court of Appeals in the first portion of its thorough mandate makes it very clear that the respondents, in accord with the order of the District Court, are, however, enjoined and restrained from making public recreational facilities available to private schools or to private school affiliated groups.

The Court in this regard specifically states: ". . . we hold that the findings and conclusions of the court are supported by the record and are sufficient to sustain that portion of the injunction which forbids scheduling athletic contests and similar functions which involve segregated private schools in municipal facilities. (App. 9a-10a; 473 F. 2d at p. 837) The Court of Appeals held that this rule applied to private schools with open admissions policies if such schools have all white enrollments.

"Therefore, we affirm the decision of the district court not to distinguish among segregated schools on the basis of their admissions policies." (App. 12a; 473 F. 2d at p. 839)

The Court of Appeals reversed the second portion of the order dealing with private non-school groups, clubs and organizations (Paragraphs 3 and 4 as set forth above) and directed these portions to be deleted.

The Court of Appeals with regard to such non-school groups held:

"While the injunction against private school usage is based upon the affirmative obligation of public authorities to eliminate educational segregation, the injunction against similar usage by non-school organizations must rest, if at all, upon a general constitutional prohibition against state sponsored racial segregation . . ." (App. 13a; 473 F. 2d at p. 838)

"Where there is no significant effect on the countervailing rights of excluded individuals, such private groups cannot be denied access [to] public

recreational facilities solely because of their discriminatory admissions policies." (App. 15a; 473 F. 2d at p. 839)

In accordance with the order of the Court of Appeals, the District Court on remand amended the injunctive order by "deleting Paragraphs 3 and 4 relating to private, non-school groups and organizations" and by amending Paragraphs 1 and 2 of said injunctive order by adding: "The injunction issued by this Court does not prohibit the City of Montgomery from permitting non-exclusive access to public recreational facilities and general government services by private schools or school affiliated groups."[5]

It is from the order of the Court of Appeals that petitioners filed a Petition for a Writ of Certiorari in the Supreme Court of the United States. The petition for writ of certiorari was granted October 15, 1973.

STATEMENT OF FACTS

The stipulation upon which the instant case was submitted to the District Court includes the following statement of agreed facts:

"Municipal recreational facilities in the City of Montgomery are not exclusively leased to any particular group and such facilities are not made available exclusively to any particular group. Football, basketball and baseball facilities are made available to groups who make application therefor on a non-discriminatory basis without regard to race or color,

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5. Order of District Court dated March 19, 1973. App. 28a-29a.

including such private groups as churches, athletic leagues, civic clubs, charitable organizations, and educational institutions, without regard to race or color. Athletic participation which is sponsored by the [Municipal] Parks and Recreation Board, i.e., junior high school age football teams, are given preference in facility scheduling. All municipal recreational facilities throughout the City of Montgomery are open to all on an equal basis with people of the community all having equal access thereto, without regard to race or color." (App. 66)

The respondents by answer to interrogatory in the District Court state: "The Parks and Recreation Department (of the City of Montgomery) make all recreational facilities available to the public generally and to organized groups for athletic competition upon application being made therefor and upon the prescribed fee being paid." (App. 49) It was further established through answer to interrogatory that publicly sponsored programs are given preference in facility scheduling. (App. 50)

Accordingly, the District Court specifically found that the respondents make recreational facilities available on a non-discriminatory basis to all private groups which apply for them including schools, churches, civic clubs and charitable organizations. (App. 18a, 337 F. Supp. at p. 24) The District Court made no findings concerning the history, frequency or effects of public recreational facilities by such non-school affiliated private organizations. This was specifically noted by the Court of Appeals together with the finding: "Furthermore, in this case which was tried on stipulated facts, nothing was stipulated which

would support this prong of the injunction." [with regard to non-school private groups—i.e., Paragraphs 3 and 4 of District Court order] (App. 13a; 473 F. 2d at p. 838, note 12)

It is a matter of public record that the City of Montgomery now provides a wide variety of recreational services on an open and non-discriminatory basis involving fully and heavily integrated programs.[6] These programs include a desegregated Golden Age Club for the elderly, desegregated pre-school activities for youngsters and desegregated community activities for all ages. Auditoriums and meeting room facilities are available throughout the City on a non-discriminatory basis to all groups and clubs with the exception of segregated private schools. This practice with the private school prohibition was permitted pursuant to the stay as granted by the District Court and is now permitted under the decision of the Court of Appeals.

Since the order of the District Court, the respondent officials have not permitted segregated private schools or school affiliated groups to use any muni-

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6. Reports filed with the District Court on December 29, 1972 and July 29, 1973.

In addition the respondents conduct a fully integrated summer program wherein deprived and underprivileged children throughout the community are picked up at their homes and transported throughout the City for attendance in such programs as arts and crafts, swimming, athletic events, games etc.

It is a matter of public record that the respondent board has received "excellent" ratings from the United States Department of Economic Opportunity and from the Department of Labor for their implementation of the summer recreational programs and from the United States Department of Agriculture with regard to the summer food program.

cipal recreational facilities. Pursuant to the decision of the Court of Appeals the respondents have not attempted to prohibit the use and enjoyment of public recreational facilities by individual children who may be enrolled in private schools, when the usage by such children is in common with the rest of the public and in common with all other children throughout the community. For example, when the museum is open, students who may be enrolled in private schools may attend along with other children or when a civic or cultural event is scheduled for public attendance, such is open to all including students who may be enrolled in private schools. As a matter of fact, these respondents have no way of ascertaining which children are enrolled in private schools and which ones attend public institutions.

The City has specifically prohibited all-white private schools and such private school affiliated groups from scheduling any athletic events or similar school functions whatsoever at public facilities. When, however, a facility is open to the public for public attendance, individual children are allowed to attend even though it may be that they are enrolled in a private school. Such attendance, of course, is in common with the attendance by other members of the public. On the other hand, private schools and private school affiliated groups are not allowed to reserve or to engage any municipal facility for their own use. This is in accord with the mandate of the Court of Appeals and is being effectively administered by the respondent officials.

The petitioners refer to past "segregationist" practices of the City of Montgomery and list several

citations involving schools and other areas of desegregation. Montgomery, Alabama, has, in fact, been judicially recognized at every level of the Federal Judiciary—the United States District Court, the Court of Appeals for the Fifth Circuit and the United States Supreme Court—for the professional manner in which the often trying problem of desegregation has been handled and effectively implemented in this community.[7] The Supreme Court of the United States through Mr. Justice Black has commended the attitude of this community toward accomplishing constitutional mandates of desegregation.[8]

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7. The Court of Appeals for the Fifth Circuit in the case of *Carr v. Montgomery County Board of Education*, 429 F. 2d 382 (1970) specifically noted:

> "11. 'This is not the first time an appellate court has taken note of the exemplary record of this district judge and the responsiveness of this school board. On the only previous appeal from a desegregation order affecting Montgomery County, both this court and the Supreme Court adverted to these factors. See Montgomery County Board of Education v. Carr, 5 Cir. 1968, 400 F. 2d 1 (opinion by Judge Gewin, noting the good faith of the Board and quoting complimentary remarks by Judge Johnson concerning the Board); United States v. Montgomery County Board of Education, 1969, 395 U. S. 225, 89 S. Ct. 1670, 23 L. Ed. 2d 263 (opinion by Mr. Justice Black, commenting favorably upon the performance of the judge and the Board.'" (429 F. 2d at p. 387).

During a stage of these proceedings petitioners petitioned the Court for a remedial order concerning a track at Carver School. The District Court recognized the efforts of these respondents and denied the motion of petitioners for attorneys' fees: "Upon consideration of this litigation and particularly this phase thereof" —order of District Court dated May 30, 1972.

8. *United States v. Montgomery County Board of Education*, 395 U. S. 225, 23 L. Ed. 2d 263, 89 S. Ct. 1670.

It is a matter of public record and public knowledge in Montgomery, Alabama that the Park and Recreation Board of the City of Montgomery is now integrated. Two of the respondents now before this Court as members of the Park and Recreation Board of the City of Montgomery are black. (Messrs. Rufus A. Lewis and James Hall—the vice chairman and immediate past vice chairman, respectively, of the respondent Board) These men are leaders in the black community and are singularly representative of the class sought to be represented by the petitioners. In addition, the superintendent of recreation for all recreational programs throughout the City of Montgomery is a black man, Mr. Percy L. King.[9] The appointment of these black representatives was voluntarily accomplished by the respondent officials, and stands as marked and documentary evidence of the progressive attitude of this community in the area of civil rights, as previously recognized by Mr. Justice Black.

It is documented in the District Court[10] that the City of Montgomery pursuant to the agreement made during January, 1970, is now completing an extensive program whereby new public community centers are available to all of the public throughout all parts

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9. Article entitled "King to Head City Parks Department", Montgomery Advertiser, August 9, 1973—In addition to Mr. King the Board employs Negroes throughout the Recreation Department. For example, under Mr. King there are two area supervisors, one of which is black, who direct biracial staffs in municipal recreation programs without regard to race or color.

10. Detailed reports filed in the District Court on December 29, 1972 and July 29, 1973.

of the City. For example, McIntyre Community Center, which will be completed in January of 1974 will include an outdoor twenty-five yard six-lane Olympic swimming pool, gymnasium, clubrooms, arts and crafts rooms, game rooms, offices, snack bar, exercise room, lobby and will be completely air-conditioned. This community center will be the largest and most elaborate in the City of Montgomery and is in a low-income and black residential area.[11] The Hayneville Road Park and Community Center is, in fact, being dedicated and opened this week (December 19, 1973) with clubrooms, recreational areas and a fourteen-acre park site.[12] Playground facilities and an all-purpose recreational court will be provided, with picnic shelters to be added at a later date. This park is also in a low-income and black residential area and will include playground equipment, outdoor basketball courts, and comfort stations. Community centers now exist throughout the City and extensive work has been done, for example, in up-grading and refurbishing play areas in the Carver area, Goode Street, Washington Park, Kings Hill and Booker-Washington areas. Smaller open-space recreational areas are being finalized adjacent to and in connection with low rent housing projects in the City and in other low-income and black areas. For example, a fifteen-acre site is being developed for the G. W. Smiley housing area

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11. Report filed with the District Court on December 29, 1972.

12. Article appearing in *Montgomery Advertiser* on December 19, 1973; also noted in *Alabama Recreation and Park News*, Vol. No. 3 at p. 13—reference to appointment of Mr. King also noted in this publication.

which will include ball fields, play areas and a swimming pool.[13]

These improvements were made pursuant to the plan voluntarily submitted by the City of Montgomery during January of 1970.

In addition to the above enumerated improvements, plans have been recently finalized and made public which show that within the next twelve months a large public recreation area is to be constructed in an area of Montgomery which is easily accessible to all races.[14] The land has been acquired for this development and funding is being secured for the construction of a public 18-hole golf course, swimming pools, bicycle trails, over-night camping facilities and picnic areas. This development is known as the Lagoon Park Recreation Area.[15]

ARGUMENT

INTRODUCTION

This case, as it now stands before the Court, involves the use of public recreational facilities by such private organizations as churches, civic clubs and charitable and fraternal organizations. It also includes the use of public recreational facilities in common

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13. Report filed with District Court December 29, 1972, Report filed with District Court June 29, 1973.

14. Article appearing in *Montgomery Advertiser* on September 5, 1973.

15. Article appearing in *Montgomery Advertiser* on September 5, 1973.

with other members of the public by individual children or groups of students who may be enrolled in private segregated schools. The case here *does not* raise the question as to grants, support or aid to private segregated schools. The Court of Appeals and the District Court each held the use of public property by segregated private schools to be constitutionally impermissible. (App. 3A-10A and App. 17A-26A)[16] The petitioners obtained in the courts below all of the constitutional relief which they sought in the area of segregated private schools.

The posture of the case as it now stands involves two remaining issues:

1. Whether a municipality is constitutionally required to prohibit all private organizations, groups and clubs which have a discriminatory admissions policy from using public recreational facilities?

2. Whether a municipality is constitutionally required to prohibit students who are enrolled in private segregated schools (both black and white) from using public recreational facilities even in common with other members of the public?

The bulk of the brief of the petitioners is addressed to the issue of private segregated schools using public recreational facilities.[17] This issue has been concluded in this case favorably to the petitioners. The City is abiding by this mandate in all respects.

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16. *Gilmore v. City of Montgomery*, 337 F. Supp. 22. *Gilmore v. City of Montgomery*, 473 F. 2d 832.

17. Petitioners in brief dwell at length on the past practice of the City during the 1950's and 1960's and make much of the case

We do not believe that non-school private clubs or children who may be enrolled in segregated private schools should be governed by the same constitutional principles as are applicable to the private segregated schools themselves.[18]

This case in 1959 originally sought and obtained for the Negroes of Montgomery, Alabama equal and non-discriminatory access to all public recreational facilities. The original plaintiffs objected to "any distinction on account of race or color in extending and granting the right and privilege of admission" to public recreational facilities. It is without dispute in the case *sub judice* that Negroes in Montgomery, Alabama are, in fact, now afforded entirely equal rights as are afforded to all members of the public. The petitioners now urge this Court to make the very racial distinctions which they sought at the outset in 1959 to prohibit. The petitioners ask this Court to make distinctions in the availability of public recreational facilities on account of the racial admission policies of private clubs, groups and organizations. The pe-

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of Smith v. YMCA, 316 F. Supp. 899 (M. D. Ala. 1970) aff'd 462 F. 2d 634 (5th Cir. 1972). We will emphasize in this brief the *present* practice of the respondents and their continuing achievements in the area of desegregated and non-discriminatory public recreation. We note here that the case of *YMCA v. Smith*, supra, requires a completely desegregated and non-discriminatory program. The petitioners do not question these *present* desegregated and non-discriminating programs.

18. This distinction between the constitutional test and standards to be applied to private clubs as opposed to segregated private schools was recognized by the District Court (337 F. Supp. 22, 25; App. 24a) and by the Court of Appeals (473 F. 2d 838-839, App. 12a-15a)

titioners seek to prohibit groups and organizations from using recreational facilities because of their racial admissions policies. The petitioners also urge that individual children and groups of children be forbidden to use and enjoy public recreational facilities because of the racial nature of the enrollment of the school they may attend.

The Civil Rights Act of 1964[19] which barred discrimination in public accommodations, specifically exempts private clubs from the application thereof. The petitioners ask this Court, in a case which originally made recreational facilities open to all, to now close such facilities to the type of organizations specifically exempted from the 1964 congressional mandate.

It was not shown in either of the courts below that any of the petitioners were excluded in any way from any recreational facilities or activities in Montgomery, Alabama. To the contrary it is without dispute that all groups, individuals and clubs, regardless of their racial composition, are welcome in all such facilities. The petitioners have not shown the slightest deprivation of their rights. There is absolutely no showing of such grave abuse as could possibly justify the denial to others of access to public recreational facilities solely because of admissions policies.[20]

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19. 42 U. S. C. Section 2000 (a) (e).

20. See *Thomas v. Collins*, 323 U. S. 516, 530, 89 L. Ed 430, 440, 65 S. Ct. 315; *Sherbert v. Verner*, 374 U. S. 398, 10 L. Ed 2d 965, 83 S. Ct. 1790.

I

PRIVATE ORGANIZATIONS INCLUDING CHURCH, CIVIC, FRATERNAL AND CHARITABLE GROUPS, OTHER THAN SCHOOLS, ARE ENTITLED TO USE AND ENJOY PUBLIC RECREATIONAL FACILITIES WITHOUT REGARD TO THE RACIAL ADMISSIONS POLICIES OF SUCH PRIVATE ORGANIZATIONS.

A. THE FOURTEENTH AMENDMENT DOES NOT REQUIRE THE EXCLUSION OF PRIVATE SEGREGATED CLUBS FROM PUBLIC RECREATIONAL FACILITIES.

The petitioners seek to prohibit all private clubs, groups and organizations from using municipal recreational facilities unless the private club has a racially open admissions policy. Governmental restriction based on discriminatory admissions policies is sought against such purely private organizations as religious, political, social, charitable and fraternal groups. The District Court found to be unconstitutional and enjoined the practice of the City in allowing all such groups, regardless of race or racial admissions policies to use public recreational facilities. The Court of Appeals held this portion of the District Court order to be overbroad. Indeed, to restrict private organizations on the basis of their admissions policies from the same use of recreational facilities as that afforded to the rest of the public is to strike at the very heart of our democratic and pluralistic society. *Evans v. Newton*, 382 U. S. 296, 298-299, 86 S. Ct. 486, 488, 15 L. Ed 2d 373; *NAACP v. Button*, 371 U. S. 415, 444-445, 83 S. Ct. 328, 344, 9 L. Ed 2d 405.

As an imminent constitutional scholar has noted, Americans have always placed great emphasis on the right to associate with others in groups; and this right has assumed increasing importance in modern times wherein, simply in order to be heard above the increasing noise of the increasing multitudes, an individual frequently finds it advisable to join with others to voice mutual concerns and to pursue common goals[21]

During the last term, this Court in the case of *Healy v. James*, 408 U. S. 169, 33 L. Ed 2d 266, 92 S. Ct. 2338, upheld the right of a student association to be recognized by the university administration and to use campus facilities including a coffee shop. The Court held:

> "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. *While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition.* Baird

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21. Emerson, FREEDOM OF ASSOCIATION AND FREEDOM OF EXPRESSION, 74 Yale L J 1.

See: Schaeffer, Private Clubs: Freedom of Association Overlooked in Effort to Guarantee Equal Protection, (1964), 23 Syracuse Law Review p. 905, "The First Amendment of the United States Constitution has been interpreted by the Supreme Court as guaranteeing freedom of association, despite the absence of language to that effect" and Gunther, The Supreme Court, 1971 Term, 86 Harvard Law Review 1 at 75 N. 34 second paragraph citing United States v. Robel, 389 U. S. 258, 19 L. Ed 2d 508, 88 S. Ct. 419. See also NAACP v. Alabama, 357 U. S. 449, 2 L. Ed 2d 1488, 78 S. Ct. 1163; Bell v. Maryland, 378 U. S. 266, 12 L. Ed 2d 822, 84 S. Ct. 1814; Evans v. Newton, 382 U. S. 296, 15 L Ed 2d 373, 86 S. Ct. 486.

v. State Bar of Arizona, 401 U. S. 1, 6, 27 L Ed 2d 639, 646, 91 S Ct 702 (1971); NAACP v Button, 371 US 415, 430, 9 L Ed 2d 405, 416, 83 S Ct 328 (1963); Louisiana ex rel. Gremillion v NAACP, 366 US 293, 296, 6 L Ed 2d 301, 304, 81 S Ct. 1333 (1961); NAACP v Alabama ex rel. Patterson, 357 US 449, 2 L Ed 2d 1488, 78 S Ct 1163 (1958)"—33 L. Ed 2d at p. 279 [emphasis added]

". . . the College, acting here as the instrumentality of the State, *may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.*" 33 L. Ed 2d at p. 283 [emphasis added]

It follows that the City of Montgomery should not be ordered to prohibit the use by purely private groups of public facilities because of their attitudes or racial policies.

In *Evans v. Newton,* supra, the Court through Mr. Justice Douglas specifically recognized:

". . . the right of the individual to pick his own associates so as to express his preferences and dislikes and to fashion his private life by joining such clubs and groups as he chooses." (15 L. Ed 2d at p. 377)

In the case of *Bell v. Maryland,* 378 U. S. 266, 12 L. Ed 2d 822, 84 S. Ct. 1814, Mr. Justice Goldberg in a concurring opinion wrote:

"Prejudice and bigotry in any form are regrettable, but *it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the*

basis of personal prejudices including race. These and other rights pertaining to privacy and private associations *are themselves constitutionally protected liberties.*" (12 L. Ed 2d at p. 848) [emphasis added]

In *United States v. Robel,* 389 U. S. 258, 19 L. Ed 2d 508, 88 S. Ct. 419, the Court reiterated that the right of association protected by the First Amendment is just as basic as the right to travel protected by the Fifth Amendment. (19 L. Ed 2d at p. 513)

In *Moose Lodge v. Irvis,* 407 U. S. 163, 92 S. Ct. 1965, 32 L. Ed 2d 627, the Court stated:

"The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the equal protection clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatsoever. Since state furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct as set forth in the Civil Rights Cases [109 US 3, 3 S Ct 18, 27 L Ed 835 (1883)] and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations, Reitman v. Mulkey, 387 US 369, 87 S Ct 1627, 1634, 18 L Ed 2d 830 (1967) in order for the discriminatory action to fall within the ambit of the constitutional prohibition." 407 U. S. at 173, 92 S. Ct. at 1971, 32 L. Ed 2d at 637.

As noted by the Court of Appeals this case does not involve any evasion of the City's responsibility to operate recreational facilities on a completely desegregated and non-discriminatory basis.[22] (App. 15a note 14)

It is well settled that private organizations such as the ones here involved would not be violating constitutional mandates by having a discriminatory admissions policy; *Moose Lodge v. Irvis Supra; Norwood v. Harrison;* ..... U S ....., 37 L Ed 2d 723, 93 S Ct. 2804

As noted hereinafter, Negroes are in no way excluded from the public recreational facilities in Montgomery. No substantial adverse effect was shown to have resulted to the petitioners from the City's completely open policy with regard to recreational facilities. The City therefore should not be required to prohibit the use of public facilities by groups who exercise a constitutional right of association.

The vague argument of petitioners with regard to emotional distress resulting to Negroes when they see segregated private groups using parks, museums and playgrounds was not presented in the trial court below. There is absolutely nothing in the record to support such an argument. In any event, the argument is illogical and without constitutional support. When Negroes either individually or with black, white or mixed groups use public facilities together and in common with the entire public, we fail to see any

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22. The respondents here are in strict compliance with the constitutional mandates set forth in Watson v. Memphis, 373 U. S. 526, 10 L. Ed 2d 529, 83 S. Ct. 1314.

basis for an inferiority argument.[23] People associate and will continue to associate and to choose their friends on the basis of individual preference. (*Bell v. Maryland*, supra) It would be impossible for one seeing a black group of individuals or a white group to even know whether the group was composed of club members. It, of course, would be impossible for one to know or to feel inferior about an admissions policy of a group he would have no reason to know would exist. More importantly, Negroes in Montgomery have the perfect right to attend any recreational facility in this community either individually or in groups. There is simply no basis for any emotional distress or feelings of inferiority. The logical conclusion from petitioners' argument would be to prohibit church, civic, political, charitable and social groups from availing themselves of our national park system, public beaches, public auditoriums, public football, baseball, basketball facilities and from all of the public recreational areas now available and being made available on a state and national basis.[24]

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23. It is appropriate to ask whether Negroes would have any different feelings from seeing a group of whites using a public facility than would whites when they see all black church, fraternal or other such private groups using a public facility.

24. See Vol. 58 Iowa Law Review 108 at p. 135:

"It could be argued at the outset that no right of association or privacy is compelling enough to suspend the termination of government involvement in private discrimination. However, such a bald assertion would require the government to discharge an employee who sends his children to segregated private schools or is a member of a segregated private club on the theory that the individual's government job enables him to pay the tuition or the dues which, in turn, furthers the discriminatory activity.

This certainly is not presently the law and we respectfully submit that the Framers of the Constitution never intended such to become the law.

B. THE PETITIONERS AND THE MEMBERS OF THEIR CLASS WERE NOT SHOWN TO HAVE BEEN EXCLUDED FROM ANY PUBLIC RECREATIONAL FACILITY OR TO HAVE BEEN DENIED EQUAL PROTECTION OF THE LAW.

It was expressly stipulated in the Court below that all public recreational facilities in Montgomery, Alabama are, in fact, open to all persons, groups and associations without regard to race. (App. 67) The District Court expressly found this to be true as did the Court of Appeals. In requiring the City to forbid private organizations with discriminatory admission policies the use of public recreational facilities, the District Court made no findings with regard to petitioners being adversely effected by the practice of allowing all non-school private groups the use of municipal facilities without regard to race. There was, in fact, nothing in the record that could warrant such a finding. The established and documented facts are to the contrary. Extensive new recreational developments are being completed, some of which are pursuant to

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It would also require the state to refrain from enforcing trespass laws against intruders upon private property who are excluded solely because of their race. It would further require that the government suspend all support to religious and political associations which discriminate in their membership. These and other examples indicate that such an absolute doctrine is unrealistic and undesirable."

the court agreement of 1970 and some including the new golf course, swimming pool areas and recreational facilities (such as swimming pools adjacent to housing projects) go far beyond the agreed plan for improvement.[25] As previously noted Negroes now have substantial representation on the respondent Parks and Recreation Board and throughout the staffing of the Recreation Department.

There was absolutely no showing by the petitioners that they were being excluded from any recreational facility or activity in Montgomery, Alabama. There was no showing by petitioners as to any purported effect of discrimination.

Mr. Justice Black in *Palmer v. Thompson*, 403 U. S. 217, 29 L Ed 2d 438, 91 S Ct 1940, in upholding the closing of swimming pools in Jackson, Mississippi, observed that ". . . a major purpose of [the Fourteenth Amendment] was to safeguard Negroes against *discriminatory state laws—state laws that fail to give Negroes protection equal to that afforded to white people.*" In *Palmer v. Thompson* the Court stated:

> "The question, however, is whether this closing of the pools is state action that denies 'the equal protection of the laws' to Negroes . . ." 29 L. Ed 2d at p. 442

The Court observed that the action by the City there involved:

> ". . . shows no state action affecting blacks differently from whites . . ." 29 L. Ed 2d at p. 445

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25. Reports filed with the District Court in December of 1972 and July of 1973. (G. W. Smiley example.)

and concluded:

> "Should *citizens of Jackson* or *any other city be able to establish* in Court that public, tax-supported swimming pools *are being denied* to one group *because of color and supplied to another*, they will be entitled to relief. But that is not the case here." 29 L. Ed. 2d at p. 446 [emphasis added]

In the case, *sub judice*, it is without dispute that all Negroes and all groups of Negroes may readily use any recreational area throughout the City of Montgomery.

In order to be entitled to constitutional relief against these respondents the petitioners must show that the City has denied to them the same protection as that provided to other citizens. The petitioners here are in the position of complaining because the City does, in fact, treat them equally and in a non-discriminatory manner.

This Court in *Moose Lodge v. Irvis*, 407 U. S. 163, 32 L. Ed 2d 627, 92 S. Ct. 1965, held:

> "In 1883 this Court in the Civil Rights Cases, 109 US 3, 27 L Ed 835, 3 S Ct 18, set forth the essential dichotomy between *discriminatory action by the State, which is prohibited by the Equal Protection Clause*, and private conduct, 'however discriminatory or wrongful,' *against which that clause 'erects no shield,'* Shelley v Kraemer, 334 US 1, 13, 92 L Ed 1161, 1180, 68 S Ct 836, 3 ALR2d 441 (1948). That dichotomy has been subsequently reaffirmed in Shelley v Kraemer, supra, and in Burton v Wilmington Parking Authority, 365 US 715, 6 L Ed 2d

45, 81 S Ct 856 (1961)." 32 L. Ed 2d at p. 637. [emphasis added]

This Court in *Moose Lodge v Irvis*, supra, held that the state licensing of the Harrisburg, Pennsylvania Moose Lodge did not significantly affect the right of minority groups to purchase liquor or to obtain club licenses for themselves. "There is no suggestion in this record that Pennsylvania Law, either as written or as applied, discriminates against minority groups either in their right to apply for club licenses themselves or in their right to purchase and be served liquor in places of public accommodation." (32 L. Ed 2d at p. 639)

In the instant case there is no suggestion in the record that Montgomery, Alabama discriminates against minority groups either in their right to apply for the use of municipal facilities or in their actual enjoyment of all facilities throughout the City. The minority groups here have all of the recreational facilities available to them on exactly the same basis as all other members of the public. No denial of equal protection has been factually alleged or shown.

In *Evans v. Abney*, 396 U. S. 435, 24 L. Ed 2d 634, 90 S. Ct. 628, the court established that in order for persons to obtain constitutional relief they must have been denied equal protection of the laws. The court in *Evans v. Abney*, supra, was writing to a similar situation as existed in *Palmer* wherein public recreational facilities were no longer to be available to any members of the public, white or black. The Georgia Supreme Court ruled that if the land passing through a trust under Senator Bacon's will could not be used

for public parks on a segregated basis, the trust failed and the land reverted to his heirs. The Court in finding no actionable discriminatory conduct on the part of the state, held:

> "Surely the Fourteenth Amendment is not violated where, as here, a state court operating in its judicial capacity fairly applies its normal principles of construction to determine the testator's true intent in establishing a charitable trust and then reaches a conclusion with regard to that intent *which, because of neutral and non-discriminatory state trust laws, effectively denies everyone, whites as well as Negroes, the benefits of the trust.*" (24 L. Ed 2d at p. 645)

> "The responsibility of this Court, however, is to enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our personal inclinations."[26] (24 L Ed 2d at p. 645)

In *Palmer* and *Abney* it was held that the closing of recreational facilities to all, whites and blacks alike, was not constitutionally forbidden. In the case, *sub judice,* no facilities are being closed. To the contrary expanded and improved recreational areas are in fact being opened and hopefully will be open to all. Surely it should not be forbidden to open recreational fa-

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26. See Schaeffer, Private Clubs: Freedom of Association Overlooked In Effort To Guarantee Equal Protection", 23 Syracuse Law Review p. 905 (1972)—"Although arguably deplorable, perhaps the membership policies of private organizations such as the Moose Club should not be changed by the courts. That change may need to come from within the organization or from the legislature." 23 Syracuse Law Review at 917.

cilities and to build additional ones which are and will be open to all blacks and whites alike.

This case is distinguished from *Norwood v. Harrison,* ..... US ....., 37 L Ed 2d 723, 93 S. Ct. 2804 in that there state grants to private segregated schools were the sole issue. The court held in *Norwood v. Harrison,* supra that the *affirmative duty* to achieve a unitary school system could not be directly or indirectly interfered with by grants of text books to private segregated schools. Here, however, as noted by the District Court "this affirmative duty *does not extend* to cases involving private groups other than those affiliated with schools." (App. 25a)

The decision of the Court of Appeals below follows the principle of *Norwood v. Harrison,* supra, and is consistent with the holding of this Court in *Moose Lodge v. Irvis,* supra, which involved a non-school private fraternal organization. In *Norwood v. Harrison,* supra, the Court observed that purely private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment. (37 L. Ed 2d at 734)

The case *sub judice is* also distinguished from *Burton v. Wilmington Housing Authority,* 365 U. S. 715, 6 L. Ed 2d 45, 81 S. Ct. 856, wherein discriminatory state action was found to exist *by the exclusion of Negroes* from a publicly owned but privately leased restaurant facility. Here, *Negroes are not excluded* from any of the publicly owned recreational facilities. As held by the Court of Appeals below, private use of recreational facilities by all private clubs, on a nondiscriminatory basis and regardless of racial composi-

tion, cannot be reasonably construed to form the basis of invidious state discrimination. Additionally the Court of Appeals found that the periodic use of recreational facilities by private organizations did not evidence the same state nexus with such groups as was shown in *Burton*.

The Court noted in *Burton* that it was impermissible to exclude a Negro from the publicly owned and privately leased restaurant area when such minority member "at the same time fully *enjoys equal access* to nearby restaurants and wholly privately owned buildings."

The petitioners would have this Court extend the principle of *Burton v. Wilmington*, supra, to hold, in effect, that Eagle, the restaurant thereinvolved, would be constitutionally forbidden to serve private clubs, groups and organizations solely on the basis of the admissions policy of such groups.

C. WHEN THERE IS NO SIGNIFICANT EFFECT ON COUNTERVAILING RIGHTS OF EXCLUDED INDIVIDUALS, PRIVATE GROUPS CANNOT BE DENIED ACCESS TO PUBLIC RECREATIONAL FACILITIES SOLELY BECAUSE OF THEIR DISCRIMINATORY ADMISSIONS POLICIES.

It cannot be argued that this case involves the necessity for a balancing of constitutional rights—since petitioners here have not shown that they have been deprived of any rights whatsoever. In this regard the Court of Appeals held that the policy of the City in permitting all persons to use recreational facilities was not shown to have any significant effect on "counter-

vailing rights of excluded individuals." As previously noted, it is settled that private groups may constitutionally engage in discriminatory admissions policies.[27] It is also settled that all persons, groups and associations have the right to use and enjoy public recreational facilities on a non-discriminatory basis.[28]

The petitioners seek to have private groups with discriminatory admissions policies elect which of their constitutionally protected rights they wish to exercise, i.e., whether such groups shall use public recreational facilities or whether they shall maintain a racially discriminatory admissions policy. To require such a decision under the non-discriminatory facts of this case is not constitutionally warranted or justified.[29]

Petitioners argue that by allowing all private clubs, regardless of their admission policies, to use public recreational facilities the City unconstitutionally lends support to discrimination. In this regard the petitioners rely principally on the case of *Reitman v. Mulky*, 387 U. S. 369, 18 L Ed 2d 830, 87 S. Ct. 1627, which struck down a statute which the court found to affirmatively authorize and permit racial discrimination in the sale of homes. The petitioners also rely here on the case of *Norwood v. Harrison*, supra the

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27. *Bell v. Maryland*, 378 U S 266, 12 L Ed 2d 822, 84 S. Ct. 1814; *Evans v. Newton*, 382 U S 296, 86 S. Ct 486, 15 L Ed 2d 373; *NAACP v. Button*, 371 U S 415, 83 S. Ct. 328, 9 L Ed 2d 405.

28. *Watson v. Memphis* 373 U S 526, 83 S. Ct. 1314, 10 L Ed 2d 529; *City of Montgomery v. Gilmore*, 277 F 2d 364 (5th Cir. 1960)

29. This case would present different constitutional issues if for any reason public recreational facilities were available *only*

textbook grant case. We fail to see how the City here in permitting all groups to use recreational facilities, encourages, supports, favors or lends prestige to one group over another. The facilities are open to all groups on a non-discriminatory basis. Unlike the segregated private school cases, there is no affirmative constitutional duty on the part of governmental agencies to achieve integrated membership in civic clubs, churches or other private organizations. The City here, as distinguished from the State in *Reitman* has not taken affirmative action to further segregation but to the contrary has adopted the policy of treating all private groups alike.

Since the petitioners have not been discriminated against or deprived of any substantial rights we fail to see any constitutional right on their part to be balanced against the right of association and the right of private clubs and organizations to use public recreational facilities. It has been long recognized that the power of government to restrict and regulate often encompasses the power to prohibit absolutely. *Lottery* Case, 188 U. S. 321.[30]

This court has consistently held that the restriction of constitutionally protected rights must be based on "only the gravest abuses endangering paramount

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to the membership of private groups from which Negroes were excluded.

As to state imposed choices between constitutionally protected rights see *Sherbert v. Verner*, supra, 10 L. Ed 2d 965, 970-971.

30. UNCONSTITUTIONAL CONDITIONS, 73 Harvard Law Review, 1595, at page 1596.

interest." *Sherbert v. Verner*, 374 U. S. 398, 10 L. Ed 2d 965, 83 S. Ct. 1790; *Thomas v. Collins*, 323 U. S. 516, 530, 89 L. Ed 430, 440, 65 S. Ct. 315. In *Healy v. James*, supra, the court noted that unpopular and even abhorrent views or attitudes give no constitutional basis for the restriction of a constitutional right.

The petitioners seek to have these respondents ordered to deny private groups with racially discriminatory admissions policies the use of public recreational facilities regardless of the size or character of the purely private group.[31] The rule urged by the petitioners would lead to substantial infringement on the rights of persons to choose their associates.

II

THE CONSTITUTION DOES NOT PROHIBIT THE USE AND ENJOYMENT OF PUBLIC RECREATIONAL FACILITIES, IN COMMON WITH OTHER MEMBERS OF THE PUBLIC, BY INDIVIDUAL CHILDREN OR GROUPS OF STUDENTS WHO MAY BE ENROLLED IN SEGREGATED PRIVATE SCHOOLS.

The respondents in accord with the mandates of the District Court and the Court of Appeals do not permit private all-white schools to use any municipal recreational facilities. Such schools are not permitted to engage, to reserve or to use any municipal facility whatsoever. Football, softball and baseball facilities are not made available to such private schools.

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31. Petitioners make no distinction between religious, political, etc., groups or as to the intimacy of the relationships involved, purposes of the club, etc.

Such private schools or school-sponsored groups are not allowed to reserve, engage or to use banquet facilities, auditoriums for dances or any other type of public facility for school meetings or any type of school-sponsored function whatsoever.

The mandate of the Court of Appeals permits the respondents to allow individual children and groups of students who may be enrolled in an all-white school to use such public facilities only during such time as the facilities can be utilized in common with other children throughout the community.[32] For example, the respondents make no effort to restrict the attendance at the public library, museum or zoo to only those children who may attend a public desegregated school. All children throughout the community are allowed to attend municipally-sponsored cultural and civic events.

The Court of Appeals noted that allowing such communal, non-exclusive use, the City was not shown to have enabled a private school to duplicate public school operations at public expense.

No one would contend that the City should deny to private schools the same generalized services with regard to police and fire protection as is afforded to other members of the community. Although the Court in *Norwood v. Harrison* held that text books may not be granted to private, segregated schools at public expense, the Court observed:

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32. This portion of the order of the Court of Appeals is discussed in Vol. 44 Mississippi Law Journal 1017 at pp. 1020-1021.

"Free textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring *to the benefit to the private schools themselves.*" (37 L. Ed 2d at 730.) [emphasis added]

The *private schools themselves* in Montgomery are not allowed the use of public recreational facilities or any other public facilities whatsoever.

The private schools as noted in *Norwood,* supra, could acquire textbooks from sources other than the state in that case. Thus to permit such schools to receive free textbooks from the state would be, in effect, to unnecessarily duplicate a school function at public expense.

In *Norwood,* supra, the Court held:

"Textbooks are a basic educational tool and, like tuition grants, they are provided *only in connection* with schools; they are to be distinguished *from generalized services government might provide to schools in common with others.* Moreover, the textbooks provided to private school students by the State in this case are a form of assistance readily available from sources entirely independent from the state—unlike, for example, 'such necessities of life as electricity, water and police and fire protection' *Moose Lodge No. 107 v. Irvis,* 403 U. S. 163, 173 (1972), *the state has neither an absolute nor operating monopoly on the procurement of school textbooks; anyone can purchase them on the open market.*" [emphasis added]

In the case of *Evans v. Newton*, supra, the Court held as follows in regard to parks:

> "A park, on the other hand, is more like a fire department or police department that traditionally serves the community. Mass recreation through the use of parks is plainly in the public domain." . . . 15 L. Ed 2d at p. 378

This municipality, regardless of what petitioners urge in brief, *does actually have an operating monopoly in the area of parks, museums, libraries and zoos.*

The petitioners urge that any assistance whatsoever to private schools with the possible exception of basic essentials, would be unconstitutional.[33] It would indeed be harsh and unconstitutionally unwarranted to deny individual children and groups of students who may attend private schools the right to use in common with other members of the public, a municipal museum or zoo. As stated by the Court of Appeals:

> "while the Constitution requires public authorities to abstain from assisting certain private schools, 'it does not require the state to be their adversary' " Everson v. Board of Education, 330 U. S. 1, 18; 67 S. Ct. 504, 513; 91 L. Ed 711 (1947)."

The petitioners would deprive children who may be enrolled in all-white private schools the opportunity

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33. The unrealistic and undesirable nature of such an absolute doctrine is noted by the commentator in 58 Iowa Law Review 108, at p. 135.

to participate along with other members of the public in all types of municipally sponsored programs. The argument of the petitioners would prohibit a group of private school children from being admitted, during school hours, to the audience in this Court. Would petitioners also restrict a group of students from an all-white private school from the Smithsonian Institute, the Library of Congress or from field trips to the Washington Monument or Lincoln Memorial? The "any aid whatsoever" argument of petitioners would lead to at least these far-reaching and unwarranted consequences.

The "exclusive use" prohibition is being effectively administered by the respondent officials in accord with the affirmative duty not to interfere in desegregated public education by assistance to private, segregated schools. We believe that the opinion of the Court of Appeals is consistent with the opinion of this Court as expressed in *Norwood v. Harrison*. The opinion of the Court of Appeals protects the right of black children not to have their desegregated education undermined and at the same time protects the rights of students who may be enrolled in an all-white school to have equal access to public facilities in common with other children of the community.

CONCLUSION

For the above and foregoing reasons we respectfully submit that the opinion of the Court of Appeals for the Fifth Circuit is due to be affirmed.

Respectfully submitted,

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